IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR.

Central Excise Appeal No. 35/2006

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.

Court's or Judge's Orders

Mr Patil, Advocate for appellant.

Coram : J.P. Devadhar and
B.P. Dharmadhikari, JJ.

Dated : 20th June 2007

1/ The Commissioner of Central Excise has filed this appeal under Section 35 G (1) of the Central Excise Act, 1944 against the order of the CEST Appellate Tribunal dated 23.11.2005 in Appeal No. E/3445/05 stating that the following question of law arises out of the order of the Tribunal :-

"Whether the CESTAT is right in allowing of Modvat credit when simultaneous availment of Modvat credit on capital goods and depreciation in Income Tax was not allowed in terms of rule 57-R (8) of the erstwhile Central Excise Rules, 1944 merely on the ground that the depreciation was subsequently not claimed in the revised return ?"

2/ In this case Modvat credit in respect of capital goods was disallowed to the respondent no. 1 - assessee on the ground that the assessee had claimed depreciation under the provisions of the Income-tax Act, 1961 in its return of income. Before the Tribunal it was contended by the assessee that they had filed revised return of income wherein depreciation had not been claimed. Therefore, the Tribunal set aside the order in original and

remanded the matter for fresh consideration.

3/ It is the contention of the revenue that once the assessee had claimed depreciation on capital goods, then Modvat Credit is not allowable. There is no merit in this contention, because the word "claimed" in the rule must be understood to mean "availed". In other words, it is only when the assessee has actually availed depreciation on the capital goods, the assessee is not entitled to the Modvat Credit.

4/ In this view of the matter, the decision of the Tribunal to remand the matter to verify as to whether the assessee has actually availed depreciation or not on the capital goods cannot be faulted.

5/ Accordingly, we do not find any merit in the appeal filed by the

revenue. No question of law arises out of the impugned order.

6/ appeal is accordingly dismissed with no order as to costs.

Judge. Judge.

hsj